T-2847-94

**Captain Hoshang Haddi* Sarafi** (*Plaintiff*)

*v.*

**The Ship "Iran Afzal"** and **Islamic Republic of Iran Shipping Lines (Iran Shipping Lines)** (*Defendants*)

***editor's note:** Should read Haddadi.

***Indexed as: Sarafiv. Iran Afzal (The) (T.D.)***

Trial Division, Noël J."Montréal, March 26; Ottawa, April 4, 1996.

*Maritime law — No state immunity with respect to ship owned by foreign government where action in rem or in personam and ship used in commercial activity (State Immunity Act, s. 7) — Claim within ambit of Federal Court Act, s. 22(2)(o) — Warrant for arrest of ship not quashed as directed at sister ship — Proceedings stayed in Canada, Iran (forum conveniens) having closest connection with action — No evidence supporting submission Iranian courts will not allow plaintiff to pursue claim.*

*Federal Court jurisdiction — Trial Division — Even if plaintiff's claim akin to one for wrongful dismissal, nevertheless within Federal Court Act, s. 22(2)(o) (jurisdiction over any claim by officer of ship for any remuneration or benefits arising out of employment)— Also jurisdiction over shares acquired under share purchase program of state agency shipping company as evidence providing factual basis for assertion claim to shares arising from employment, not advanced as shareholder.*

*Conflict of laws — Forum non conveniens — F.C.T.D. action in rem and in personam by ship's master for wages, social benefits, value of shares stayed as: plaintiff Iranian citizen; defendant was Iranian state agency; contract of employment governed by laws of Iran; shares lost due to Iranian nationalization program; no evidence plaintiff would be denied justice by Iranian courts.*

The plaintiff brought an action *in rem* against the *Iran Afzal* and *in personam* against the defendant Islamic Republic of Iran Shipping Lines (IRISL) for unpaid wages and benefits. The plaintiff having obtained the arrest of the ship, the defendant, IRISL, posted bail to otain its release. The ship was owned by the IRISL, an agency of the government of Iran. The plaintiff had never worked on the *Iran Afzal* itself, but on sister ships owned by IRISL. This was an application by the defendant, IRISL, for an order dismissing the action on the ground that the Court was without jurisdiction to hear the claim as the defendants benefit from state immunity; or alternatively, for an order quashing the arrest of the ship and an order directing a stay of proceedings on the ground that the Federal Court of Canada was not a convenient forum to hear the claim.

*Held*, the proceedings should be stayed.

The jurisdictional argument based on state immunity could not succeed. Section 7 of the*State Immunity Act* excludes state immunity in so far as *in rem* actions against a ship owned or operated by the state are concerned if, at the time the claim arose, the ship, as in this case, was being used in commercial activity " it is the nature of the activity in which it was engaged, and not its purpose in the perspective of the state, that must be considered in assessing whether or not the ship was engaged in commercial activity. A

similar exception extends to actions *in personam* to enforce a claim in connection with a ship owned or operated by the state.

On a plain reading of section 7 of the *State Immunity Act*, it matters not whether the ship in issue is or is not "directly" connected with the events which gave rise to the claim. Even if the plaintiff's claim was more akin to a claim for wrongful dismissal, paragraph 22(2)(*o* ) of the *Federal Court Act* was cast in language broad enough to include it: *Demetries Karamanlis v. The Norsland*. In so far as the claim pertains to the shares held by the plaintiff in IRISL, it nevertheless fell within the ambit of paragraph 22(2)(*o*) since there was evidence to support plaintiff's assertion that the claim in this respect arose out of his employment and was not being advanced in his quality of shareholder.

An order quashing the arrest of the ship as well as the bail posted could not be granted. While there were inaccuracies in the application to obtain the warrant, they were not sufficient to justify quashing it. It was made clear at that time that the action and the warrant to arrest were directed at the *Iran Afzal qua* sister ship. It was also apparent that there was at the relevant time a reasonable basis for believing that the *Iran Afzal*and the ships on which the plaintiff served were beneficially owned by the defendant in the name of the state of Iran.

The proceedings ought, however, to be stayed on the ground that this Court was not the convenient forum to dispose of the claim. A decision on *forum conveniens* is a matter of pure discretion. There was no doubt that the jurisdiction that had the closest connection with the action, or the natural forum, was Iran. The plaintiff was a citizen of Iran, the entity being sued was an agency of the state of Iran, the contract of employment was governed by the laws of Iran and the nationalization program which led to the loss of the plaintiff's shares proceeded under Iranian law. In face of this, the plaintiff had to establish that there were special circumstances which could compel this Court to assume jurisdiction despite the fact that it was not the natural forum for its disposition. There was nothing to support plaintiff's main contention that the Iranian courts would not allow the plaintiff to pursue his claim there, thereby denying him substantial justice. Furthermore, whether the matter proceeds in Iran or in Canada, it will have to be decided under Iranian law.

statutes and regulations judicially considered

*Federal Court Act*, R.S.C., 1985, c. F-7, ss. 22, 43(7), (8) (as am. by S.C. 1990, c. 8, s. 12), 50(1).

*Federal Court Rules*, C.R.C., c. 663, RR. 401, 1002(2) (as am. by SOR/79-57, s. 17), (2.1) (as enacted by SOR/92-726, s. 11), 1003(2)(*f*) (as enacted *idem*, s. 12).

*State Immunity Act*, R.S.C., 1985, c. S-18, ss. 2 "agency of a foreign state", "commercial activity", "foreign state", 3(1), 5, 7(1),(2).

cases judicially considered

applied:

*Demetries Karamanlis v. The Norsland*, [1971] F.C. 487 (T.D.); *Antares Shipping Corporation v. The Ship —Capricorn— et al.*, [1977] 2 S.C.R. 422; *Yasuda Fire & Marine Insurance Co. Ltd. v. The Ship Nosira Lin*, [1984] 1 F.C. 895; (1984), 52 N.R. 303 (C.A.);*Burrard-Yarrows Corp. v. The Hoegh Merchant*, [1982] 1 F.C. 248 (T.D.); *Eleftheria, The*, [1969] 1 Lloyd's Rep. 237; *Amchem Products Inc. v. British*

*Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; (1993), 102 D.L.R. (4th) 96; [1993] 3 W.W.R. 441; 23 B.C.A.C. 1; 77 B.C.L.R. (2d) 62; 14 C.P.C. (3d) 1; 150 N.R. 321; 39 W.A.C. 1;*Spiliada Maritime Corpn. v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.).

considered:

*Mount Royal/Walsh Inc. v. Jensen Star (The)*, [1990] 1 F.C. 199; (1989), 99 N.R. 42 (C.A.).

APPLICATION for an order, based on state immunity, dismissing the plaintiff's action for unpaid wages and benefits; or an order quashing the arrest of the vessel *Iran Afzal* as well as bail posted to obtain its release; or an order directing a stay of the proceedings. The proceedings should be stayed, the Federal Court of Canada not being *forum conveniens*.

counsel:

*Andrea J. Sterling* for plaintiff.

*Nick J. Spillane* for defendant.

solicitors:

*Gottlieb & Pearson*, Montréal, for plaintiff.

*McMaster Meighen*, Montréal, for defendant.

*The following are the reasons for order rendered in English by*

Noël J.: This is an application by the defendant, Islamic Republic of Iran Shipping Lines (IRISL) for:

i) an order dismissing the plaintiff's action for unpaid wages and benefits, on the ground that this Court is without jurisdiction to hear the plaintiff's claim as the defendants IRISL and the ship *Iran Afzal* benefit from state immunity; or alternatively,

ii) an order quashing the arrest of the vessel *Iran Afzal* as well as bail posted to obtain the release of the *Iran Afzal* from arrest, on the ground that the plaintiff's claim does not give rise to a right of arrest of the *Iran Afzal*,

iii) an order directing a stay of the proceedings on the ground that this Court is not a convenient forum to hear the present claim.

1. Facts

This application arises in the course of the plaintiff's action *in rem* against the defendant ship *Iran Afzal* and *in personam* against the defendant IRISL for unpaid wages, social benefits and pension and the value of shares and dividends invested in the defendant company. On November 30, 1994, the plaintiff, Captain Hoshang Haddadi Sarafi (Captain Haddadi or the plaintiff), filed a statement of claim wherein he made the following allegations:

The plaintiff is a Master Mariner with 22 years of sailing experience. During that time, he served the defendant as an officer and Master Mariner on the defendant's merchant vessels. The defendant ship *Iran Afzal*, owned by the defendant IRISL, employed the plaintiff as Master of said ship.

As a result of his employment by the defendant, the plaintiff was entitled to payment of various wages and benefits. The defendant has failed to pay the plaintiff the following amounts:

| | | |
|---|---|---|
| Wages: | US$ | 14,000 |
| Savings, social benefits and pension: | US$ | 125,099.14 |
| Admitted claim: | US$ | 25,826.22 |
| Hotel and Transportation expenses:[1] | US$ | 12,818.20 |
| Hospitalization expenses:) | US$ | 9,765 |
| Value of shares: | US$ | 16,289 |
| Dividends: | US$ | 1,225,173 |
| Total: | (CAN$ | 1,428,970.56 |
| | | 1,933,825.86 |

The plaintiff therefore claimed CAN$1,933,825.86 with interest in addition to a maritime lien against the defendant vessel and entitlement to hold the vessel as security for his claim.

The plaintiff's solicitor immediately obtained a warrant to arrest the *Iran Afzal*, one of the defendant's vessels, which was in the port of Vancouver on November 30, 1994. The defendant IRISL filed a conditional appearance under Rule 401 [*Federal Court Rules*, C.R.C., c. 663] pursuant to the order of Denault J., dated December 6 1994. On December 7 1994, the defendant's solicitor examined Captain Haddadi on the affidavit to lead warrant filed by the plaintiff.[2] The plaintiff consented to release the *Iran Afzal* on December 19, 1994 when the defendant posted bail in the form of a bank guarantee.[3]

The plaintiff's examination on the affidavit to lead the warrant brought to light the following additional facts and clarifications important to the disposition of this application:

Captain Haddadi is a citizen of Iran. He comes to Canada occasionally to visit his mother or when he has to join a vessel in Canada. At the time of the examination, the plaintiff had been living with his mother in Pierrefonds, Quebec for two months, and had lived the previous six months in Iran.[4]

Captain Haddadi stated that he began working in 1968 as an employee of the Arya National Shipping Line, which later became IRISL. The plaintiff admitted that he had never served physically on the *Iran Afzal*, but stated that he had served on other IRISL vessels which were sister ships of the *Iran Afzal*. The plaintiff's claim for wages relates to the period of time (including leave time) during which he served, under contract, on the ships*Iran Baseer* and *Iran Basheer* in 1992. These ships are owned by Khazar or Caspian

Shipping Company, which at that time was affiliated with IRISL.[5] Prior to this contract, the plaintiff's last command was in August of 1986.

The affidavit of Mahmoud Bassiri Abyaneh (a lawyer employed by IRISL) filed by the defendant in support of the application raises the following facts concerning the employment of the plaintiff with the defendant company, as well as the corporate organization and constitutional framework of IRISL:

IRISL was constituted in or about 1980 as the result of a nationalization programme of state industries directed by the Government of the Islamic Republic of Iran following the political transformation which occurred in Iran in 1979.[6] Its predecessor, Arya National Shipping Lines (Arya), was heavily indebted to the Iranian banks which owned 51% of its shares. Following the nationalization of the banks, and the nationalization of Arya, the shares of IRISL became and continue to be the property of the Government of the Islamic Republic of Iran.[7] The effect of the nationalization under Iranian law was to constitute a new company (IRISL) to which the assets of Arya were transferred, but which had none of the liabilities of the former company. Employee-shareholders of Arya received some payment according to a schedule set out in a *procès-verbal* of the ordinary general meeting of IRISL on March 8, 1987.[8] However, only employees employed with the company at that time could benefit from this payment.

Captain Haddadi was a permanent employee of Arya from December 18, 1971 until October 16, 1986 when he was dismissed for unjustified absence. On May 28, 1992, the plaintiff was rehired on a contractual basis to serve on IRISL vessels. The plaintiff never served on the *Iran Afzal*, which was only built in 1983 after the nationalization of Arya and the creation of IRISL.[9] The *Iran Afzal* is a bulk carrier normally engaged in the carrying of cargo belonging to other Iranian state companies and at the time of the arrest, was waiting to load grain for an Iranian state company.

The Bassiri affidavit asserts that the *Administrative Justice Tribunal Act* of Iran grants exclusive jurisdiction over employer-employee disputes to Iranian tribunals, and that the plaintiff's employment contract is subject to Iranian law.[10] In addition, the Bassiri affidavit states that in the period between 1971 and 1986, the plaintiff's employment was governed before the revolution by the Labour Law of Iran and subsequently by a special law governing the employment of sea personnel by IRISL.

2. Relevant legislative provisions

*Federal Court Act*[11]

**22.** (1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:

. . .

(*o*) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his employment;

. . .

(3) For greater certainty it is hereby declared that the jurisdiction conferred on the Court by this section is applicable

(*a*) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;

. . .

**43.** . . .

(7) No action *in rem* may be commenced in Canada against

. . .

(*c*) any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arises or the action is commenced, the ship is being used exclusively for non-commercial governmental purposes.

(8) The jurisdiction conferred on the Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.

. . .

**50.** (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

*State Immunity Act*[12]

**2.** In this Act,

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

"foreign state" includes

"agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

. . .

(*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state

. . .

**3.** (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

. . .

**5.** A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

. . .

**7.** (1) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(*a*) an action *in rem* against a ship owned or operated by the state, or

(*b*) an action *in personam* for enforcing a claim in connection with a ship owned or operated by the state,

if, at the time the claim arose or the proceedings were commenced, the ship was being used or was intended for use in a commercial activity.

(2) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(*a*) an action *in rem* against any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the cargo and the ship carrying the cargo were being used or were intended for use in a commercial activity; or

(*b*) an action *in personam* for enforcing a claim in connection with any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the ship carrying the cargo was being used or was intended for use in a commercial activity.

3. Analysis and Decision

State immunity

The first argument is that this Court is without jurisdiction to hear the plaintiff's claim as the defendant IRISL and the ship *Iran Afzal* are protected by state immunity. In order for this argument to succeed, the defendant IRISL must bring itself within the ambit of the*State Immunity Act*. In this connection, the evidence has established that IRISL is an agency of the state of Iran, and that, as such, it comes within the definition of "foreign state" under the *State Immunity Act* .[13] The evidence has also established that IRISL is the owner of the *Iran Afzal*. However, section 7 of the Act creates an exception to the foreign state immunity in so far as *in rem* actions against a ship owned or operated by the state are concerned if, at the time the claim arose or the proceedings were commenced, the ship was being used in commercial activity. A similar exception extends to actions *in personam* for enforcing a claim in connection with a ship owned or operated by the state.

The defendant takes the position that section 7 of the *State Immunity Act* does not apply in the case at hand. First, the defendant argues that at the relevant time the *Iran Afzal* was not engaged in commercial activity but in a state-driven enterprise. Specifically, the defendant argues that at the time of its arrest, the *Iran Afzal* was waiting to load grain for an Iranian state company and that the grain was destined for internal consumption in Iran. I see no basis for this argument. The *Iran Afzal* was at the

relevant time a bulk cargo carrier awaiting a load of grain, and it is the nature of the activity in which it was engaged, and not its purpose in the perspective of the state that must be considered in assessing whether or not the ship was engaged in commercial activity.[14]

The defendant further argues that section 7 is restricted in its application to situations where there is an immediate connection between the ship and the claim being asserted. Here, the only connection is that the *Iran Afzal* is a sister ship to those on which the plaintiff served. The defendant adds that when the *State Immunity Act* was enacted in 1982,[15] there was no such thing as an *in rem* right of action against a sister ship.[16]Hence the defendant argues that an *in rem* right of action against a sister ship could not have been in the contemplation of the legislator when section 7 of the *State Immunity Act* was enacted.

Accepting that this may be so, it remains that on a plain reading, section 7 of the *State Immunity Act* operates to create an exception to state immunity whether the ship in issue is or is not "directly" connected with the events which gave rise to the claim. All that section 7 requires is that the action be against a ship owned by the state and that the ship be used in commercial activity at the relevant time. These conditions are extent and applicable in the case at hand and as otherwise subsection 43(8) of the *Federal Court Act* grants this Court jurisdiction over *in rem* actions directed "against any ship that . . . is beneficially owned by the person who is the owner of the ship that is the subject of the action", the application of section 7 of the *State Immunity Act* cannot be avoided.

The defendant further argues that the plaintiff's action is more akin to a claim for wrongful dismissal than to a claim for wages and benefits arising out of his employment. The defendant therefore argues that the claim cannot be enforced by an *in rem* action as it does not come within the ambit of paragraph 22(2)(*o*) of the *Federal Court Act*.

I note in this respect that paragraph 22(2)(*o*) is cast in broad language. It refers to "any claim . . . for wages, money, property or other remuneration or benefits arising out of . . . employment." In *Demetries Karamanlis v. The Norsland* ,[17] Pratte J. (as he then was) was confronted with an identical argument. He dealt with it as follows at page 493:

The plaintiffs, apart from their regular wages, also claim the additional "three months wages" to which they were entitled by virtue of the above-quoted stipulations of their contracts of service.

It is clear that these additional wages are, in fact, liquidated damages. It is also clear that there was a breach of the contracts of service on the part of the owners. Consequently, under the terms of their contracts of service, the master and the crew are entitled to the indemnity that had been agreed upon. The sole issue to be determined in this connection is whether this claim could be enforced by an action *in rem*.

I believe that this Court has jurisdiction to entertain a claim *in rem* by a seaman for compensation for wrongful discharge (*The Great Eastern* (1867) L.R. 1A. & E. 384; *The Blessing* (1873) 3 P.D. 35; *The British Trade* [1924] P. 104; *Federal Court Act* S.C. 1970, c. 1, secs. 22 and 43). I therefore conclude that this part of the plaintiffs' claim should be allowed. I point out, however, that I do not mean to say that the plaintiffs' rights to these liquidated damages are secured by maritime liens; this is an altogether different question that need not be determined here.[18]

On the basis of this authority, I conclude that even if the plaintiff's claim is more akin to a claim for wrongful dismissal, it nevertheless comes within the ambit of paragraph 22(2)(*o*) of the *Federal Court Act*.

The defendant finally argues that the claim in so far as it pertains to the shares held by the plaintiff in IRISL does not fall within the ambit of paragraph 22(2)(*o*) of the *Federal Court Act*. In this respect, I agree with the defendant that, although the plaintiff may have acquired the shares in question in the course of his employment through what appears to be a share purchase program, any rights which he now wishes to assert with respect to these shares would be advanced in his quality of shareholder. As such, these claims are not "for wages, money, property or other remuneration or benefits arising out of his employment" within the meaning of paragraph 22(2)(*o* ) of the *Federal Court Act*. However, counsel for the plaintiff properly points out that, in the affidavit filed by the defendant in support of this application, a direct connection is made between the plaintiff's employment and the treatment given to the shares which he owns.[19] Indeed, this evidence does provide the plaintiff with a factual basis for asserting that his claim with respect to the shares arises out of his employment and is not being advanced in his quality of shareholder.

I therefore reject the application of the defendant in so far as it is based on state immunity.

The arrest of the *Iran Afzal*

In the alternative, the defendant seeks an order quashing the arrest of the *Iran Afzal* as well as the bail posted to obtain its release on the ground that the plaintiff did not have the right to arrest the vessel at the relevant time. Specifically, the defendant maintains that the action filed and the application which led to the issuance of the warrant were not framed by reference to subsection 43(8) of the *Federal Court Act* and were not aimed at the arrest of a sister ship. Indeed, the defendant points out that subsections 1002(2) [as am. by SOR/79-57, s. 17] and (2.1) [as enacted by SOR/92-726, s. 11] of the Rules were not complied with in that only the *Iran Afzal* was named as a defendant in the statement of claim. As well paragraph 1003(2)(*f*) [as enacted *idem*, s. 12] of the Rules was not complied with in that the affidavit to lead the warrant fails to assert reasonable grounds to believe that the ships on which the plaintiff served are sister ships to the *Iran Afzal*.

These objections, while valid, do not allow me to quash the warrant at this stage of the proceedings. The plaintiff was examined extensively on the affidavit to lead warrant some two years ago. It was made clear at that time that the action and the warrant to arrest were directed at the *Iran Afzal qua* sister ship.[20] It is also apparent that there was at the relevant time a reasonable basis for believing that the *Iran Afzal* and the ships on which the plaintiff served were beneficially owed by the defendant in the name of the state of Iran. While leave to amend the statement of claim so as to correct the deficiencies identified by the defendant would be required if this action was to be allowed to proceed, these do not allow me to quash the arrest of the *Iran Afzal* or cancel the bond posted to obtain its release at this stage of the proceedings.

Stay of proceedings

Finally, the defendant argues that these proceedings ought be stayed on the ground that this Court is not the convenient forum to dispose of the claim. According to the defendant, the issues raised in the present proceedings should be decided by the Iranian courts.

It is well established that once the Court determines that it has jurisdiction to hear an action, the decision as to whether it should dispose of it when another forum is also capable of doing so is a matter of pure discretion. A general statement of the factors to be considered by the Court in exercising that discretion can be found in *Antares Shipping Corporation v. The Ship —Capricorn— et al.* where it is stated:

The factors affecting the application of this doctrine [of *forum conveniens*] have been differently described in various cases, to some of which reference will hereafter be made, and they include the balance of convenience to all parties concerned, including the plaintiff, the undesirability of trespassing on the jurisdiction of a foreign state, the impropriety and inconvenience of trying a case in one country when the cause of action arose in another where the laws are different, and the cost of assembling foreign witnesses.[21]

In *Yasuda Fire & Marine Insurance Co. Ltd. v. The Ship Nosira Lin*, the Federal Court of Appeal identified the essential consideration as follows:

The real question to be answered on an application of this kind is stated by paragraph 50(1)(*b*) of the *Federal Court Act*; is it in the interest of justice that the proceedings be stayed? That question must be answered in the light of the principles that were formulated by Lord Diplock in *MacShannon v Rockware Glass Ltd*, [1978] 1 All E.R. 625 (H.L.) at 630:

In order to justify a stay, two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court,. . . .[22]

In *Burrard-Yarrows Corp. v. The Hoegh Merchant* the Trial Division of this Court adopted the more elaborate statement of Brandon J. in *Eleftheria, The*, [1969] 1 Lloyd's Rep. 237, at page 242:

The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[23]

More recently,[24] our Supreme Court revisited the governing principles of the doctrine of*forum conveniens* for the first time since it had done so in *Antares*. Sopinka J., after noting that the identification of the *forum conveniens* has become more difficult in a world where litigation, like commerce, is becoming increasingly international, stated:

In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "[t]he substantial ends of justice would require

that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate.

This does not mean, however, that "forum shopping" is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.[25]

In the case at hand, there is no doubt that the jurisdiction that has the closest connection with the action, or the natural forum,[26] is Iran. The plaintiff is a citizen of Iran, the entity being sued is an agency of the state of Iran, the contract of employment is governed by the laws of Iran, the nationalization program which led to the loss of the plaintiff's shares proceeded under Iranian law. The only link between the plaintiff's claim and Canada is the allegation that he is domiciled in Canada and, of course, the fact that the ship was arrested in Canada where a bond was subsequently posted to obtain its release.

In the words of Sopinka J. in *Amchem*,[27] where a defendant discharges the burden of demonstrating "that there is another forum which is clearly more appropriate for the trial of the action . . . a stay will be granted unless the plaintiff establishes special circumstances by reason of which justice requires that the trial takes place"[28] in Canada. In assessing the existence of these special circumstances:

Mere loss of a juridical advantage will not amount to an injustice if the court is satisfied that substantial justice will be done in the appropriate forum.[29]

Applying the foregoing to the present case, the defendant has clearly demonstrated that Iran is the country with which this litigation has the "most real and substantial connection" and hence, the natural forum for its disposition.[30] The question then becomes whether the plaintiff has established special circumstances which could compel this Court to assume jurisdiction despite the fact that it is not the natural forum for its disposition. In this regard, the only allegation which could be considered as evoking special circumstances of the type discussed by the Supreme Court in *Amchem* is that found in the affidavit filed in response to the present application wherein it is stated that Captain Haddadi is reluctant to institute proceedings in Iran because:

He fears that any action implicating the Islamic Republic of Iran will be impossible to institute in Iran due to the fact that Iranian Courts leave no jurisdiction to sue the State.[31]

This suggests at first blush that the Iranian courts will not allow the plaintiff to pursue his claim thereby denying him substantial justice. However, nothing is offered to support this contention. The defendant for its part asserts that:

. . . the tribunnals (*sic*) of Iran have exclusive jurisdiction to decide about disputes between employees of the state and the state employers.[32]

The certified English translation of the *Administrative Justice Tribunal Act* of Iran is annexed to the affidavit in support of this statement.[33] On the face of it, this Act does confer upon the courts of Iran jurisdiction to entertain suits against the state by state employees. There is no evidence before me establishing that the courts of Iran would refuse to exercise this jurisdiction other than the bold assertion that Iranian courts "leave no jurisdiction to sue the State." More than that is required to, in effect, put into question the integrity of the judicial system of a foreign state. Nothing has been placed

before me to suggest that the courts of Iran will refuse to exercise the jurisdiction conferred by the laws of Iran.

I hasten to add that whether the matter proceeds in Iran, or in Canada, it will have to be decided under Iranian law. The complaint of the plaintiff is not directed at Iranian law or its effect on him, but at the Iranian judicial system based on his belief that Iranian courts will not hear his claim. While the plaintiff may hold this belief, he has placed before me no evidence which would allow me to conclude that justice will not be done in Iran.

Finally, I recognize that the plaintiff has secured the enforcement of a Canadian judgment in the event that one should intervene in his favour and that this is a factor to consider in the determination of the *forum conveniens*. Indeed, in *Antares*, the fact that the execution of an eventual judgment in Canada had been secured was a determinative factor in the decision reached by the Court to assume jurisdiction. However, in that matter, the situation of the defendants was such that the plaintiff's ability to enforce a judgment in its favour was wholly dependent on the existence of security and Canada was the only jurisdiction in which a bond securing an eventual judgment had been posted. Against this background, the Court concluded that Canada was the most convenient forum for both the pursuit of the action and for securing the ends of justice. Here, of course, there is no question as to the defendant's capacity to pay in the event that the Iranian courts should find in favour of the plaintiff. The fact that a bond has been posted in Canada is therefore not an essential consideration in determining where the ends of justice will best be met.

For these reasons, I come to the conclusion that the present proceedings ought to be stayed so that they may be instituted and pursued in Iran. The irrevocable letter of guarantee issued to obtain the release of the *Iran Afzal* will be maintained in place for thirty (30) days from the date of this judgment in order to allow the plaintiff to take steps to preserve the security in the event that he chooses to exercise his right of appeal. An order is issued accordingly.

[1] The plaintiff has since advised the defendants' solicitor that the amounts claimed for wages and dividends are US$11,400 and US$723,955 respectively: see examination of Captain Haddadi, December 7, 1994, at pp. 13-14 (hereinafter examination of Captain Haddadi).

[2] The affidavit to lead warrant had in fact been sworn by the plaintiff's solicitor, but the parties agreed that the information in the affidavit was on the knowledge, information and belief of Captain Haddadi.

[3] The bank guarantee is in the amount of CAN$420,000.

[4] In the affidavit sworn on March 25 1996 in response to the present application, the plaintiff's solicitor states that he is informed by Captain Haddadi that he is presently domiciled in Canada; see affidavit of Marc de Man, at para. 2a).

[5] According to Captain Haddadi, all telex correspondence was sent from these ships directly to the IRISL head office in Teheran; see examination of Captain Haddadi, *supra*, note 1, at p. 25.

[6] See exhibit B to the affidavit of Mahmoud Bassiri Abyaneh, sworn October 18, 1995 (hereinafter the Bassiri affidavit).

[7] See p. 2 of exhibit A to the Bassiri affidavit: article 8 of the articles of association of IRISL state that at the date of the nationalization, the accumulated "loss" of the company exceeded the shareholders' rights, and provided that an audit of the company's assets would be carried out. Once this was done, article 9 provided that the nationalization would be complete and the shares would belong to the Government of the Islamic Republic of Iran.

[8] Bassiri affidavit, appendix C.

[9] See in this respect, appendix F to the Bassiri affidavit: the Arya / IRISL fleet personnel system computer printout reveals that the plaintiff served on the *Iran Milad*, the *Iran Meead*, the *Iran Jenan*, the *Iran Besat*, the *Iran Shahdat*, the *Iran Sedaghat*, the *Iran Hojat*, the *Iran Jahad*, the *Iran Ekram*, the *Iran Ershad*, the *Iran Elham* and the *Iran Sarbaz*.

[10] A translation of the relevant provisions of chapter (2) of the Iranian *Administrative Justice Tribunal Act* provided in Exhibit D of the Bassiri affidavit reads as follows:

Art. 11"Capability and limit of authorities of the tribunal are as follows:

1" Trial on complaints, petitions and objections of legal persons or legal entities thereof.

A" Decisins [*sic* ] and actions of the government organizations both ministries, organizations, institutions, municipalities, institutions and revolutionary foundations and affiliated institutions.

B" Decisions and actions of the officials of the said organizations inserted in clause (A) regarding the affairs thereto.

C" Bylaws and other orders, government regulations and municipalities with regard to their objections with law and administration of justice of people in cases that the decisions or actions or the said regulations for the cause of their being against law or incapability of the related authority or trespass or abuse of authorities or breach in enforcing law and regulation or refrain from performing duties which may lead to waste of people"s right.

2" Trial on objections, complaints from judgments and final decisions of the Administrative Courts, Investigation Boards and committees such as Tax Committees, Workshop Councils, labor and employer dispute settlement board, committee subject to Art 100, Municipalities Law, committee subject to Art. 56, preservation law and exploitation from forests and natural resources., exclusively with regard to breaching of law and regulations or objection therewith.

3" Trial on complaints of judges and people subject to the state civil employment law and other employees of organizations and institutions inserted in clause (1) and employees of institutions that inclusion of this law concerning them, requires mentioning their names, both military or civil, regarding abuse of employment rights.

Note 1" Determination [*sic* ] the amount of damage caused on the part of institutions and the said persons mentioned in clauses 1 and 2 of this Art. following the verification of the tribunal is the responsibility of the public court.

Note 2" Decisions and judgments of the courts and other judicial authorities of the Justice Administrations, military, judges, disciplinary courts of the Justice Admin. and army, are not compainable [*sic* ] at the Admin. Justice tribunal.

Note 3" Records for trial on complaints regarding this clause, studid [*sic* ] at the public courts or state Supreme court and up to the date of convening the tribunal, no order has been issued, will be turned over to the Admin. Justice court.

[11] R.S.C., 1985, c. F-7 [ss. 22, 43(7), (8) (as am. by S.C. 1990, c. 8, s. 12), 50(1)].

[12] R.S.C., 1985, c. S-18.

[13] **2.** In this Act,

"foreign state" includes

. . .

(*b*). . . any agency of the foreign state.

[14] S. 2 of the Act provides that "`commercial activity' means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character." (Emphasis added.)

[15] The Act came into force on July 15, 1982.

[16] S. 43(8) of the *Federal Court Act* which now provides for this right of action came into force in 1992.

[17] [1971] F.C. 487 (T.D.).

[18] With respect to this last distinction made by Pratte J. between actions *in rem* and maritime liens, reference can be made to the following statement of Marceau J.A. in*Mount Royal/Walsh Inc. v. Jensen Star (The)*, [1990] 1 F.C. 199 (C.A.), at p. 214:

As it is well known, the so-called statutory right *in rem* that the Canadian law accords to the supplier of necessaries is quite different from a maritime lien. A maritime lien is, in effect, a privilege against a ship which attaches and gains priority by pure effect of the law and travels with the ship wherever it goes and in whosever hands it comes.

Here, the plaintiff is asserting a maritime lien as well as pursuing an *in rem* action. However, as the evidence reveals that the plaintiff never served on the *Iran Afzal*, it is apparent that the only recourse that can be validly pursued is the *in rem* action against the *Iran Afzal qua* sister ship.

[19] See para. 8 of the Bassari affidavit where it is stated that although the rights of the shareholders of IRISL were declared "lost", "employees who were formerly shareholders of Arya received some payment . . . but there was a requirement that an employee be currently employed which Captain Haddadi was not at the time".

[20] See examination of Captain Haddadi, *supra*, note 1, at p. 20.

[21] [1977] 2 S.C.R. 422, at p. 448 (hereinafter *Antares*).

[22] [1984] 1 F.C. 895 (C.A.), at pp. 900-901.

[23] [1982] 1 F.C. 248 (T.D.), at p. 250.

[24] ;*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (hereinafter *Amchem*).

[25] *Ibid*., at p. 912.

[26] That is, "the one with which the action has the most real and substantial connection"; see *Amchem* , *supra*, note 24, at p. 916.

[27] Restating the rule established by the House of Lords in *Spiliada Maritime Corpn. v. Cansulex Ltd.*, [1987] A.C. 460.

[28] *Supra*, note 24, at pp. 916-917.

[29] *Ibid*., at p. 917.

[30] The burden of making this demonstration is particularly onerous where, as here, there are no parallel foreign proceedings pending. See *Amchem*, at p. 921. However, there is no doubt in this instance that the defendant has discharged this burden.

[31] Affidavit of Marc de Man, *supra*, note 4, at para. 2b).

[32] Bassari affidavit, at para. 10.

[33] Bassari affidavit, *supra*, note 10.